STATE OF NEW YORK COURT OF APPEALS

HON. JUDITH S. KAYE, *Chief Judge, presiding.*

No.7

In the Matter of Crown
Communication New York, Inc.,
Respondent,

v.

Department of Transportation of
the State of New York,
Respondent,
City of New Rochelle, et al.,
Appellants;
James Cavanaugh, &c.,
Intervenor-Respondent.

(Matter No.1)

In the Matter of Crown
Communication New York, Inc.,
Respondent,

v.

Department of Transportation of
the State of New York,
Respondent,
City of New Rochelle, et al.,
Appellants.

(Matter No.2)

The appellants in the above entitled appeal appeared by the Hon. Bernis E. Shapiro, Corporation Counsel, City of New Rochelle; the respondents appeared by Crane Greene & Parente, Esqs. and the Hon. Eliot Spitzer, Attorney General

of the State of New York; the intervenor-respondent appeared by Wilson Elser Moskowitz Edelman & Dicker, LLP; and the amicus curiae appeared by Riele J. Morgiewicz, Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Graffeo. Judges G.B. Smith, Rosenblatt and Read concur. Judge Ciparick dissents and votes to reverse in an opinion in which Chief Judge Kaye and Judge R.S. Smith concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Westchester County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Stuart M. Cohen, Clerk of the Court

State of New York
Court of Appeals

DECISION February 10, 2005

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Order Affirmed, with costs. Opinion by Judge Graffeo. Judges G.B. Smith, Rosenblatt and Read concur. Judge Ciparick dissents and votes to reverse in an opinion in which Chief Judge Kaye and Judge R.S. Smith concur.

State of New York
Court of Appeals

No.7
In the Matter of Crown
Communication New York, Inc.,
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OPINION

Department of Transportation of
the State of New York,
Respondent,
City of New Rochelle, et al.,
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In the Matter of Crown
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Department of Transportation of
the State of New York,
Respondent,
City of New Rochelle, et al.,
Appellants.
(Matter No.2)

Kathleen E. Gill, for appellants.
Katherine H. Zalantis, for intervenor-respondent.

David Axinn, for respondent Department of Transportation.
Jacqueline P. Murray for respondent Crown Communication New York, Inc.
New York State Conference of Mayors and Municipal Officials, amicus curiae.

GRAFFEO, J.:

In this case we are asked whether the installation of private antennae on two state-owned telecommunications towers is exempt from local zoning regulation. Under the particular facts and circumstances of this case, we conclude that the commercial telecommunications providers involved in this state project are not required to make applications for special permits.

In 1997, the New York State Police, on behalf of itself and participating state agencies including the Department of Transportation (DOT or collectively the State), entered into a Site Manager Agreement with Castle Tower Holding Corporation to provide Castle with an exclusive license to construct and operate telecommunications towers on state-owned lands and rights-of-way. Castle subsequently assigned the agreement to Crown Communication New York, Inc. Under the terms of the state contract, Crown was permitted to license space on the towers to localities and commercial wireless providers, and the State retained the right to co-locate its own communications equipment on the towers.

After Crown identified two potential locations for towers on state-owned property within the City of New Rochelle (the City), the State granted Crown conceptual approval to commence a preliminary site evaluation for the construction of both towers. One proposed tower, consisting of a 120-foot monopole, would replace an existing 110-foot lattice communications tower located on a DOT right-of-way. The other planned tower -- a lattice-type structure -- would

be erected at a DOT maintenance yard. Both sites are situated along the Hutchinson River Parkway.

In May 2000, Crown informed the City of its telecommunications plans. The following month, Crown and the State gave a public presentation to the mayor and city council regarding the purpose and intended use of the two proposed towers. At this meeting, the City voiced no objection to the siting or construction of the towers and Crown offered space on the facilities to the municipality for use by its public safety agencies. This invitation was reiterated in correspondence sent to the City. Thereafter, DOT, as lead agency, performed an environmental review of both sites pursuant to the State Environmental Quality Review Act (SEQRA). DOT issued a negative declaration for each location, finding that neither the replacement tower nor the maintenance yard tower would result in any significant adverse environmental or aesthetic impact based on the nature and location of the sites.

Crown proceeded with the construction of the towers and entered into license agreements with a number of commercial wireless telecommunications providers to lease space on the towers for their equipment.[1] After the maintenance yard tower was completed, and during construction of the replacement tower, the City issued a stop work order, contending that the towers were subject to the City's zoning laws and that Crown must therefore apply for a special permit from the City's planning board.

In 2001, Crown commenced separate hybrid declaratory judgment and CPLR article 78 proceedings seeking a judgment prohibiting the City from enforcing its

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[1] Both towers have been fully operational since March 2002. At oral argument, the State indicated that five commercial wireless telecommunications companies have installed equipment at the replacement tower site and four companies have placed antennae on the maintenance yard tower.

zoning regulations to halt construction of the towers and a declaration that the towers were exempt from the local zoning regulations. The two proceedings were later consolidated. Although DOT was a named defendant, it joined in the relief sought by Crown. The Supervisor of the Town of Eastchester later intervened as an additional defendant.

Supreme Court initially declared the towers immune from local zoning regulations and enjoined the City from interfering with their construction and operation. The court applied the "balancing of public interests" test adopted by this Court in Matter of County of Monroe (72 NY2d 338 [1988]) and determined that the State's interests outweighed the City's interests. After reargument, Supreme Court modified its prior order to the extent that it found that the private telecommunications providers licensed to install their equipment on the towers were subject to local zoning regulation, concluding that there was no basis to exempt them from such laws. The court, however, adhered to its original determination that Crown need not comply with local zoning requirements regarding the construction of the towers.[2]

The Appellate Division modified by declaring that the wireless telecommunications providers are not subject to local zoning regulation and otherwise affirmed (309 AD2d 863 [2003]). The court held that the telecommunications companies "are not precluded from enjoying the State's immunity simply because they are private entities or because collocating on the DOT's towers will advance their financial interests" (id. at 866, citing County of Monroe, 72 NY2d

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[2] Because the City failed to challenge the immunity of the towers themselves on appeal, their exemption from local zoning regulation is not at issue in this case.

338; Murphy v Erie County, 28 NY2d 80 [1971]). Thus, the court determined, "it is not the private status of the Wireless Telephone Providers but, rather, the public nature of the activity sought to be regulated by the local zoning authority that is determinative of this case" (id.). We granted the City leave to appeal and now affirm.

The City argues that, although the towers themselves are exempt from regulation, no justification exists to extend such immunity to the installation of commercial equipment on the towers. Specifically, the City asserts that it has the right pursuant to its zoning authority to evaluate whether private antennae are necessary to close cellular telecommunications coverage gaps or should be placed elsewhere, and to require some form of aesthetic camouflaging of equipment. In response, Crown and the State contend that the private carriers are entitled to share in the immunity already enjoyed by the state-owned towers. They claim that the State's plan envisions a public-private partnership and that the joint use of its towers facilitates the State's public safety and environmental goals.

In County of Monroe, we addressed the applicability of local zoning laws where a conflict arises between two governmental entities. There, the issue was whether the expansion and accessory uses of a county-owned airport located within the City of Rochester were subject to the City's zoning regulations. Abandoning the traditional governmental-proprietary classification standard used to resolve competing land use claims between governmental units, we articulated a "balancing of public interests" test (County of Monroe, 72 NY2d at 341). Balancing a number of factors, including "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests," we held that they weighed in favor

of granting the County immunity for the airport's expansion. (id. at 343 [quotation marks and citation omitted]). We also concluded that such immunity extended to additional structures, including an airport terminal, an air freight facility and parking lots, and that such exemption was appropriate despite the fact that portions of the new structures were to be leased for use by commercial entities (see id. at 344-345).

In this case, although we are faced not with a dispute between two municipalities but between a state project and a locality, County of Monroe informs the result. Here, the State submitted evidence of numerous benefits the government's use of the towers would afford the public, which Supreme Court took into account in finding the towers immune from local regulation under the balancing test. For example, the State is currently in the process of developing its telecommunications infrastructure in anticipation of establishing a Statewide Wireless Network (SWN), which will replace outdated systems with a state-of-the-art digital land mobile radio network designed to permit interagency and intergovernmental communications across the state in emergency situations. According to the affidavit of the State Police's Administrative Officer and Program Manager of the Site Manager Agreement, the SWN will operate in the 700-800 megahertz frequency range, while the State Police's current communications system uses a 150 megahertz range. Consultants retained by the State Police have indicated that in order to operate in the higher frequency range, it will be necessary to construct three to four times the approximately 150 existing state-maintained radio sites. The State has therefore reserved space on the replacement and maintenance yard towers for anticipated SWN use when the network becomes operational.

Additionally, DOT has developed an Intelligent Transportation System (ITS), which monitors traffic flow, weather and road conditions. DOT's Director of Traffic

Engineering and Safety stated that the collection of such data aids DOT and public safety entities in being able to "respond to emergency situations, manage and divert traffic, and provide real-time traffic information to motorists," thereby improving the safety of the traveling public and reducing travel times. DOT explained that the maintenance yard tower utilizes equipment that supports the ITS, and indicated its intention to co-locate additional equipment on the replacement tower. DOT has also placed a radio antenna on the maintenance yard tower to improve the communications range for its maintenance crews and installed video surveillance cameras for improved security at its maintenance yard.

Finally, the State has followed a policy of offering space on its towers to local public safety authorities and offered such space on the two towers to the City in this case. Currently, Westchester County has placed antennae on the replacement tower for use by its Department of Public Safety.

Although Supreme Court determined on reargument that no basis existed to exempt the wireless providers from local zoning regulations, we agree with the Appellate Division that the installation of licensed commercial antennae on the towers should also be accorded immunity because co-location serves a number of significant public interests that are advanced by the State's overall telecommunications plan. At this time, there are apparently more private than public antennae on the towers, but the presence of commercial equipment does not exclusively serve private interests. The private antennae will improve the availability of 911 emergency cellular calls made by the public, thereby promoting the public safety interest central to construction of the State's towers. The Highway Emergency Local Patrol (HELP), consisting of a fleet of trucks which patrol highways -- including the Hutchinson River Parkway -- relies on wireless services provided by one of the carriers currently

co-located on the towers. Numerous state agencies, including the Thruway Authority, Dormitory Authority, Department of Environmental Conservation and Department of Health utilize cellular phone services supported by the carriers in this case. Significantly, the co-location of public and private equipment also eliminates the need for the proliferation of telecommunications towers, an important environmental and aesthetic public concern. Furthermore, profits derived from licensing space to wireless providers will ultimately aid in financing the construction of the State's telecommunications infrastructure plan.

The fact that the wireless providers will also realize profit from their services does not undermine the public interests served by co-location. Such shared use and benefit is analogous to the airport development project in County of Monroe, which likewise served both public and private interests. Subjecting the private carriers to local regulation in this case "could otherwise foil the fulfillment of the greater public purpose of promoting" the State's public safety and environmental goals associated with its telecommunications infrastructure development plan (County of Monroe, 72 NY2d at 344). In sum, the public and private uses of the towers are sufficiently intertwined to justify exemption of the wireless providers from local zoning regulations. [3]

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[3] The dissent focuses on whether the State has preempted the telecommunications field with regard to the construction of facilities. It is true that where the State preempts a particular area and indicates an intention to preclude local regulation, any inconsistent local law is rendered inapplicable (see Incorporated Vil. of Nyack v Daytop Vil., Inc., 78 NY2d 500, 505 [1991]). We agree with the dissent that the State has not preempted this area of the law. Nevertheless, preemption is not the only means for determining whether a particular activity is exempt from local zoning regulation. We find the principles outlined in County of Monroe applicable to this case, such that the immunity afforded the towers should extend to the wireless providers' antennae.

Little Joseph Realty, Inc. v Town of Babylon (41 NY2d 738 [1977]), relied upon by the City, is distinguishable. In that case, the issue was whether a town's zoning regulations applied to an asphalt plant operated for private profit but located on town-owned land which had been leased to a private entity. Applying the now-abandoned governmental-proprietary function test, we held that the local zoning laws were applicable, reasoning that because the plant "was operated solely by and for the commercial benefit of . . . a private entrepreneur," the lease arrangement "could not serve to clothe [the entrepreneur] with immunity from the zoning laws" (id. at 742 [emphasis added]). This case, by contrast, does not merely involve the lease of government-owned space to a private firm for the exclusive purpose of making a profit. Rather, the licensing of space to commercial wireless providers is an integral component of the State's plan of promoting public safety and reducing the proliferation of cellular towers, clearly salient public purposes.

Nor does the extension of immunity to the private providers in this case conflict with the Telecommunications Act of 1996 (TCA) (47 USC § 151 et seq.). Section 332 of the TCA provides that, subject to enumerated exceptions, "nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities" (47 USC § 332 [c] [7] [A]). While the TCA may not limit a government's zoning ability, it does not dictate that a locality's regulations trump State interests where competing interests exist. Rather, consistent with County of Monroe, we conclude that any income the wireless providers derive from the antennae placed on the two towers does not subvert the underlying public interests served by the enhancement of wireless telecommunication, and such equipment is therefore embraced within the immunity already afforded to the

state-owned towers pursuant to the balancing test.[4]

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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[4] We emphasize that our determination that immunity is warranted in this case should not be taken as blanket authority for the placement of state-owned towers at any location the State desires. Here, after performing SEQRA review, DOT concluded that the towers would not have any adverse aesthetic or environmental impact based on their nature and location: one merely replaced an existing tower while the other was placed in a DOT maintenance yard. Moreover, Supreme Court, in applying the County of Monroe balancing test, found that the nature of the towers' locations did not weigh in the City's favor.

Matter of Crown Communication New York, Inc. v Department of Transportation of the State of New York, et al.

No.7

CIPARICK, J. (dissenting):

Because I do not believe the exemption from local zoning regulation accorded to the state-owned telecommunications towers should be applied to the private telecommunications providers here, I respectfully dissent.

Placement of private wireless service facilities are ordinarily subject to local zoning requirements. This case differs from the typical scenario because the private providers locate their antennae on a state tower that is immune from local regulation. The issue before this Court is whether that immunity should be extended to benefit the private providers -- allowing them immunity from local zoning simply because they opt to co-locate on a state, rather than a private, tower.

The City of New Rochelle Code contains zoning regulations specifically pertaining to telecommunications facilities (New Rochelle Code Article IXA). * While the City understands the need for telecommunications services, it "finds that these regulations are necessary to protect the environmental, scenic and historical resources of the city and to ensure that adverse visual and operational effects will not contribute to blighting or deterioration of the surrounding neighborhood" (New Rochelle Code § 331-64.2). The Code

* The regulations cited were the regulations in effect at the time of the controversy. The provisions pertaining to wireless telecommunications facilities have been amended and now appear at § 331-99 (amended 1-15-02 by Ord. No. 21-2002).

states that shared use of existing towers (co-location) is favored (see New Rochelle Code § 331-64.4 [B]). The Code also provides that applications will be granted in order to fill in gaps in service (see New Rochelle Code § 331-64.4 [C]). The Code lists specific requirements for applicants seeking to co-locate on existing telecommunications facilities (see New Rochelle Code § 331-64.5).

The preliminary inquiry here should be whether the State has preempted this area so that local zoning does not apply. In Incorporated Village of Nyack v Daytop Village, Inc., (78 NY2d 500 [1991]), we addressed whether the operator of a state-licensed residential substance abuse facility was subject to local zoning laws. We engaged in a preemption analysis to determine whether the Nyack Zoning Code was preempted by article 19 of the Mental Hygiene Law (see Inc. Vil. of Nyack, 78 NY2d at 505). "Where the State has demonstrated its intent to preempt an entire field and preclude any further local regulation, local law regulating the same subject matter is considered inconsistent and will not be given effect" (Inc. Vil. of Nyack, 78 NY2d at 505). The Court found that the Village had an important interest in regulating substance abuse facilities and that "separate levels of regulatory oversight [could] coexist" (Inc. Vil. of Nyack, 78 NY2d at 507).

Here, the state has not preempted the field of regulating telecommunications facilities. The State Department of Transportation (DOT) does have statutory authority to lease property on or along special parkways -- which include the Hutchinson River Parkway (see Transportation Law §§ 71 [2], 70 [2] [a]). In addition, the DOT commissioner must also grant permits for any construction or improvements on a state highway right of way "notwithstanding any consent or franchise granted by any town or county superintendent, or by any other municipal authority" (Highway Law § 52). However, while the State does have some measure of control over

development in these areas, it does not rise to the level of preemption.

The statutes do not explicitly limit local zoning authority and do not demonstrate any specific intent to preempt this area. Further, although the Commissioner has the authority to lease state highway property, the statute provides that development of such property "shall be subject to the zoning regulations and ordinances of the municipality in which said property is located and to the support, protection or relocation of any public utility facilities within the right of way of any highways within said property" (Highway Law § 10 [38]). Thus, rather than preemption, the statute contemplates that state and local zoning regulation can coexist.

The federal Telecommunications Act of 1996 (TCA) (47 USC §§ 151 et seq.) also specifically preserves local zoning authority. The TCA states that the Act will not limit local authority over the placement of private wireless service facilities with limited exceptions pertaining to regulations that are either discriminatory or prohibit service (see 47 USC § 332 [c] [7] ; see also 47 USC § 253 [c]; Chambers v Old Stone Hill Road, 1 NY3d 424, 433 [2004]; majority op at 11).

Absent state preemption, the City has a legitimate interest in regulating the placement of private wireless facilities within its borders, and the wireless carriers should have applied for a special permit through the City's Planning Board. Like Inc. Vil. of Nyack, there is no proof that the City's regulations would be inconsistent with the State's ultimate goal of setting up a Statewide Wireless Network (SWN) (see 78 NY2d at 508). Thus, the City should be permitted to exercise its authority to regulate the placement of private wireless communications facilities.

Nor is there any other barrier to the application of local zoning law. The test articulated in Matter of County of Monroe (72 NY2d 338 [1988]) and adopted by the majority

in this case, is inapplicable to this situation. The "balancing of public interests" test applies to disputes between "governmental units" -- specifically whether an "encroaching governmental unit" will be subject "to the zoning requirements of the host governmental unit" (see County of Monroe, 72 NY2d at 343). By contrast, this case involves the interests of the municipality. (New Rochelle) on the one hand and the interests of the commercial wireless providers on the other. As the majority notes, the immunity of the state towers is not at issue (see majority op at 5, n 2). As the Attorney General concedes, it is not at all clear that County of Monroe is applicable to the State -- as the State is sovereign rather than a "governmental unit."

Even applying County of Monroe, there is no basis to cloak the private providers with the State's immunity. The factors to be weighed in the "balancing of public interests" test include "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests" (County of Monroe, 72 NY2d at 343 [quotation marks and citation omitted]). Additional factors include "the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, and alternative methods of providing the needed improvement. . . [as well as] intergovernmental participation in the project development process and an opportunity to be heard" (County of Monroe, 72 NY2d at 343).

The State undeniably has an important interest in the SWN to improve State Police communications and in the Intelligent Transportation System (ITS) to improve the safety of travel. It also has an interest in improving 911 service. These interests apply to the utility of the towers in general -- which is not at issue here. What is at issue here is whether state immunity should be conferred upon private providers.

The SWN is a prospective development in its planning stages. Thus, the primary use of the tower is currently private, making the majority of the benefits claimed to flow from the tower speculative. The type of land use involved is the placement of private wireless equipment -- typically an area subject to regulation by localities. Indeed, such local regulatory authority is specifically preserved by the TCA. Here, there was a lack of intergovernmental participation as to whether the private providers should be permitted to co-locate on the towers.

Significantly, the majority fails to address what effect, if any, the local zoning regulation would have upon the proposed use. There is no indication that local zoning would conflict with these purposes. The New Rochelle Zoning Code reflects a preference for co-location -- making the application procedure for shared use less rigorous than for a new tower (see New Rochelle zoning Code §§ 331-64.5, 331-64.6). The City also has legitimate interests in regulating telecommunication facilities, such as "protect[ing] the appearance and property value of neighborhoods" as well as "protect[ing] the environmental, scenic and historical resources of the city and to ensure that adverse visual and operational effects will not contribute to blighting or deterioration of the surrounding neighborhood" (New Rochelle Zoning Code § 331-64.2). In addition, "once an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader" (Sprint Spectrum, L.P. v Willoth, 176 F3d 630, 643 [2d Cir 1999]). There is no evidence that there were service gaps here that would have required the private providers to place their antennae in these particular locations. Here, given the primarily private use of the towers and the absence of any indication that the zoning provisions would conflict with State purposes, there is an insufficient basis upon which to apply the State's immunity to the private providers.

The majority also contends that profits from granting

space to the private providers that "will ultimately aid in financing the construction of the State's telecommunications infrastructure plan" is a consideration in determining whether the private providers should benefit by the State's immunity (majority op at 9). To suggest that mere enhancement of the State's revenue is the sort of "public interest" that can justify exemption from local regulation can lead to abuses if taken to an extreme.

Nor should the private providers be considered an accessory use, such as "[t]he airport terminal, parking facilities, and air freight facility" in County of Monroe (72 NY2d at 345). The Court determined those uses were accessory to the airport and should benefit by immunity, deeming them "customarily incidental to an airport operation" (County of Monroe, 72 NY2d at 345). Here, the primary use of the towers is commercial and the SWN is a speculative future project. The private providers are engaged in their ordinary business which could be conducted on any tower -- whether State or private. While the private providers may confer a benefit, the tower could function without them. Thus, these do not appear to be the type of accessory uses contemplated by County of Monroe.

It is also persuasive that the parties provided for compliance with local zoning requirements in the "tower license agreement" between Crown and the private providers. The agreement states that "[t]he access to, and installation, maintenance and operation of, Licensee's Site Equipment must at all times be in strict compliance with the Technical Standards, all applicable federal, state and local laws, ordinances, and regulations (including without limitation the FCC, Federal Aviation Administration, city zoning, building and fire codes) . . . ."

The State's conduct essentially amounts to selling its immunity from zoning regulations. This particular conduct was rejected by this Court in Little Joseph Realty, Inc. v Town of Babylon (41 NY2d 738, 742 [1977]) and by the

Southern District in Omnipoint Communications, Inc. v Common Council of the City of Peekskill (202 F. Supp 2d 210, 225 [SD NY 2002] ["Non-governmental uses, such as the lease of space to private corporations for the construction of a personal wireless service facility, are not immune from local zoning requirements"]). Little Joseph concededly relied upon the since-rejected governmental- proprietary function distinction. However, the premise that a government entity should not be permitted to sell its own immunity from local zoning regulations to private parties remains valid.

The State's immunity from local zoning requirements should not be extended to the private providers. The State has not preempted this area and there is no indication that the local zoning regulations would conflict with the State's purposes. Thus, I would reverse the order of the Appellate Division and reinstate the order of Supreme Court.

* *

Order affirmed, with costs. Opinion by Judge Graffeo. Judges G.B. Smith, Rosenblatt and Read concur. Judge Ciparick dissents and votes to reverse in an opinion in which Chief Judge Kaye and Judge R.S. Smith concur.

Decided February 10, 2005

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

__AD2d__ Argued - September 11, 2003

MYRIAM J. ALTMAN, J.P.
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN
DANIEL F. LUCIANO, JJ.

2002-06435 DECISION & ORDER

In the Matter of Crown Communication New York, Inc., petitioner-plaintiff-appellant, v Department of Transportation of the State of New York, respondent-defendant-appellant, City of New Rochelle, et al., respondents-defendants-respondents; James Cavanaugh, etc., intervenor-respondent
(Matter No.1)

(Index No. 7863/01)

In the Matter of Crown Communication New York, Inc., petitioner-plaintiff-appellant, v Department of Transportation of the State of New York, i respondent-defendant-appellant, City of New Rochelle, et al., respondents-defendants-respondents.
(Matter No.2)

(Index No. 9166/01)

Crane, Greene & Parente, Albany, N.Y.
(John P. Stockli, Jr., and Jacqueline Phillips Murray of counsel), for petitioner-plaintiff-appellant.

Eliot Spitzer, Attorney-General, New York, N.Y. (Michael S. Belohlavek, David Axinn, and Richard Lombardo of counsel), for respondent-defendant-appellant.

Kathleen E. Gill, New Rochelle, N.Y., for respondents-defendants-respondents.

Wilson, Elser, Moskowitz, Edelman & Dicker, White Plains, N.Y. (Steven M. Silverberg of counsel), for intervenor-respondent.

In related hybrid proceedings pursuant to CPLR article 78, inter alia, in the nature of prohibition to prohibit the City of New Rochelle, J. Robert Dolan, as Commissioner of the Department of Public Works of the City of New Rochelle, and the Commissioner and/or Deputy Commissioner of the Department of Development from enforcing the City of New Rochelle's zoning regulations against the construction of two telecommunications towers, and actions, inter alia, for a judgment, declaring that the two towers are exempt from local zoning regulations, the petitioner- plaintiff appeals, and the respondent-defendant Department of Transportation of the State of New York separately appeals, from an order of the Supreme Court, Westchester County (Colabella, J.), entered July 2, 2002, which, upon reargument, modified a prior order and judgment (one paper) of the same court entered November 13, 2001, finding that the commercial telecommunications providers licensed to install their equipment on the towers are subject to local zoning regulations.

ORDERED that the order is modified, on the law, by deleting the provision thereof which, upon reargument, found that the commercial telecommunications providers licensed to install their equipment on the towers are subject to local zoning regulations, and substituting therefor a provision, upon reargument, modifying the order and judgment by declaring that the commercial telecommunications providers

licensed to install their equipment on the towers are not subject to local zoning regulations; as so modified, the order is affirmed, with one bill of costs to the appellants.

In August 1997 the New York State Police (hereinafter the State Police), on behalf of itself and participating State agencies including the Department of Transportation (hereinafter the DOT, entered into an agreement with Castle Tower Holding Corporation (hereinafter Castle), pursuant to which Castle was granted an exclusive license to construct and operate telecommunications towers on certain State-owned lands and rights-of-way. In March 1998 Castle assigned the agreement to Crown Communication New York, Inc. (hereinafter Crown). Under the terms of the agreement, Crown was permitted to license space on these towers to, among others, commercial Wireless telecommunications providers, and the State retained the right to collocate its own communications equipment on the towers. The towers, nevertheless, remain the property of the state.

In June 2000 Crown, the State Police, and the DOT informed officials of the City of New Rochelle (hereinafter the City) of their plans to construct a tower at a DOT maintenance yard and to replace an existing tower on a DOT right-of-way. Both sites are located within the City along the Hutchinson River Parkway. Thereafter, Crown proceeded with the plans to construct the towers and entered into license agreements with four commercial wireless telecommunications providers (AT&T Wireless Services, Sprint Spectrum, L.P., Omnipoint Communications, Inc., and Nextel of New York, Inc.) (hereinafter the Wireless Telephone Providers) to share space on the towers. No zoning approval was sought from the City. When the towers were under construction, the City withdrew its sidewalk permit with respect to one tower and issued a notice of violation and stop-work order with respect to the other tower, contending that the towers were subject to the City's

zoning regulation requiring application for a special permit from the Planning Board of the City of New Rochelle for the construction of a wireless telecommunications facility (see New Rochelle Code, article IXA, § 331-64.4[A]).

Crown then commenced these hybrid proceedings and actions seeking, inter alia, to prohibit the City from enforcing its zoning regulations against the towers and for a judgment declaring that the towers are exempt from local zoning regulations. By order and judgment entered November 13, 2001, the Supreme Court applied the "balancing of public interests" test adopted by the Court of Appeals in *Matter of County of Monroe* (72, NY2d 338, 341) and inter alia, found that the two towers were exempt from local zoning regulations and enjoined the City from interfering with the construction and operation of the towers. By order entered July 2, 2002, the Supreme Court granted the City's motion for leave to reargue and, upon reargument, modified the prior order and judgment to the extent that it found that the Wireless Telephone Providers licensed to install their equipment on the towers were subject to the City's zoning regulations, and otherwise adhered to its original determination.

Contrary to Crown's contention, the Supreme Court providently exercised its discretion in granting leave to reargue (see CPLR 2221 [d] [2]; *Matter of Eveready Ins. Co. v Farrell*, 304 AD2d 830; *Rodney v New York Pyrotechnic Prods.*, 112 AD2d 410).

However, we agree with the appellants that the Wireless Telephone Providers who have licensed space on the subject towers are not subject to the City's zoning regulations (*see Matter of County of Monroe, supra*). The Wireless Telephone Providers are not precluded from enjoying the State's immunity simply because they are private entities or because collocating on the DOT's towers will advance their financial interests (*see Matter of County of Monroe, supra; Murphy v Erie County*, 28 NY2d 80). Thus,

it is not the private status of the Wireless Telephone Providers but, rather, the public nature of the activity sought to be regulated by the local zoning authority that is determinative in this case.

Moreover, the fact that collocation on the DOT's towers will further the private interests of the Wireless Telephone Providers does not undermine the public purposes underlying the licenses granted by the State. The DOT has expressed its intention to locate its new transit communications system and Intelligent Traffic System on the towers, the State Police will have the opportunity to collocate its new communications equipment on the towers, the towers have the potential to become part of a statewide wireless network, and space on the towers has been offered to local public safety agencies. The goals of the DOT and the State Police to improve traffic flow, motorist safety, and emergency response along the Hutchinson River Parkway would be facilitated by, and partially financed by, the shared use of the towers.

Furthermore, the present case concerns more than just a municipality leasing space to a private entity (cf. *Matter of Foster v Saylor*, 85 AD2d 876). The shared use of the towers is integral to the State plan of improving its own telecommunications infrastructure and furthers the State's goal of reducing the proliferation of towers. As in *Matter of County of Monroe*, (supra at 344), allowing the City to enforce its zoning laws against the Wireless Telephone Providers under these circumstances would "foil the fulfillment of the greater public purpose" in constructing these facilities.

Finally, neither the Telecommunications Act of 1996 nor the license agreements mandate compliance with local zoning regulations under the circumstances herein.

ALTMAN, J.P., KRAUSMAN, GOLDSTEIN and LUCIANO, JJ., concur.

October 20, 2003 ENTER: James Edward Pelzer, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

Entered Nov 13, 2001

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CROWN COMMUNICATION NEW YORK, INC.

Petitioner-Plaintiff,

-against-

Index #7863/01
Decision, Order & Judgment

CITY OF NEW ROCHELLE, JAMES M. MAXWELL, AS INTERIM/ACTING COMMISSIONER OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF NEW ROCHELLE, and DEPARTMENT OF TRANSPORTATION OF THE STATE OF NEW YORK,

Respondents-Defendants.

-and-

JAMES CAVANAUGH, AS TOWN SUPERVISOR OF THE TOWN OF EASTCHESTER AND JAMES CAVANAUGH, INDIVIDUALLY,

Intervenor Respondents-Defendants.

---x

CROWN COMMUNICATION NEW YORK, INC.
Petitioner-Plaintiff,

-against-

Index #9166/2001

Decision, Order & Judgment

CITY OF NEW ROCHELLE, THE COMMISSIONER AND/OR DEPUTY COMMISSIONER OF THE DEPARTMENT OF DEVELOPMENT OF THE CITY OF NEW ROCHELLE, and THE DEPARTMENT OF TRANSPORTATION OF STATE OF NEW YORK,

Respondents-Defendants.

---x

The following papers numbered 1-74 were read on petitions/complaints for injunctive and declaratory relief:

Notice of Amended Petition, Amended Summons, Amended Petition/Complaint, Affidavits, Exhibits, Memorandum [Index #7863/01] - 1-13

Order to Show Cause, Summons, Petition/Complaint, Affidavits, Exhibits, Memorandum [Index #9166/01] - 14-23

Answers 24 [City], 25 [City] 26 [DOT], 27 [Cavanaugh], 28 [Crown]

Answering Affidavits, Exhibits, Memoranda - 29-43 [City], 44-67 [DOT], 68 [Cavanaugh]

Reply Affidavits, Exhibits, Memoranda - 69-70,70-72 [Crown]

Stipulation of Joinder & Order [6/18/01] - 73

Letter [Lombardo 7/27/01] - 74

Petitioner challenges the City of New Rochelle's ("City") jurisdiction to regulate two cellular towers on property owned by New York State and under the

jurisdiction of the Department of Transportation ("DOT"). The first cell tower replaces an existing tower at the intersection of the Hutchinson River Parkway and Wilmot Road in the City. The second cell tower is located at the DOT Maintenance Yard at Exit 15 of the Hutchinson River Parkway in the City.[1]

At issue is whether the towers are subject to local regulation under the balancing test adopted in (County of Monroe v. Rochester, 72 NY2d 338, which sets forth various factors to consider in resolving a conflict between the zoning jurisdiction of one political unit and proposed action of another governmental unit that owns land within the former's boundaries. The following analyzes the application of those factors to the facts at bar.

The nature and scope of the instrumentality seeking immunity.

Although the subject proceedings are brought by Crown Communication New York, Inc. ("Crown"), it does so in its capacity as an agent of the Department of Transportation ("DOT") and DOT joins in the relief requested by Crown. The Court, therefore, deems DOT to be the instrumentality seeking immunity. As a state agency, the Department of Transportation ("DOT") occupies the same status as the State.[2] DOT is charged with the responsibility of coordinating and developing a comprehensive

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[1] The first tower is the subject of the proceeding under index #7863/01; the second tower is the subject of the proceeding under index #9166/01. These proceedings have since been joined.

[2] Cases cited by the City involving state authorities are distinguishable. State authorities are not the same as the State, but separate entities created by legislation.

transportation policy for the State including maintenance of the highways under its jurisdiction.

The kind of function of land use involved and the legislative grant of authority to the encroaching governmental unit.

The development of cell tower sites along or near transportation corridors, such as the Hutchinson Parkway, falls within the ambit of authority of DOT and is consistent with, and related to, its governmental function in managing the transportation corridors under its jurisdiction.

The Court rejects the argument that DOT is required under Highway Law section 10(38) to comply with local zoning regulations. The provisions of the Highway Law in question only apply in the case of a sale or lease of property by DOT. DOT has done neither in this case. The Telecommunications Site Manager Service Agreement makes Crown responsible for the design, construction, operation, marketing and maintenance of wireless telecommunications facilities on State property, but Crown has no ownership or possessory interest in the sites under its management.[3]

The further argument, that the arrangement violates the federal Telecommunications Act of 1996, 47 U.S.C. section 151, et seq ("TCA"), is specious. The preservation of local jurisdiction in the TCA begs the question of whether local regulation is applicable. Nor is there any basis to find that either DOT or Crown have violated the prohibition in the TCA against discrimination among cellular service providers.

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[3] The reliance by the City and Intervenors on language in the licensing agreements, that the licensees will comply with local regulations, is equally misplaced. Compliance need only be made with "applicable" requirements. Whether a particular regulation is applicable remains to be determined.

The extent of the public interest to be served.

The towers in question will support DOT's Intelligent Transportation System and have the potential to support the Statewide Wireless Network, thereby improving the communication abilities of the State Police. The maintenance yard tower will also increase the communication range for DOT's maintenance workers. In addition, use of the facilities by wireless and cellular telecommunications carriers, inures to the benefit of the public by closing coverage gaps that may exist in the carriers' networks, enhancing the public's ability to report emergencies from cellular phones.[4] By co-locating equipment for both private and public telecommunications needs, DOT is reducing the proliferation of towers as well.

The effect of local land use regulation would have on the enterprise concerned and the impact upon legitimate local interest.

Subjecting the DOT sites to local regulation may have a significant negative impact in that it could impede the development of a comprehensive statewide system involving transportation and related communications. On the other hand, the City has failed to show that the cell towers will have "a significant impact on any legitimate local interest. One tower mere]y rep]aces a preexisting tower "located along the Hutchinson Parkway while the other tower is situated in a maintenance yard. As discussed below, DOT also conducted a SEQRA review of the proposed actions and found the towers would have no significant environmental

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[4] Wireless telecommunications services fall within the definition of "public utility" as services "essential to the public interest..." (Cellular Tel. Co. v. Rosenberg, 82 NY2d 364).

impacts.

Alternative locations for the facility in less restrictive zoning areas and alternative methods of providing the needed improvement.

The City has failed to show that there are alternative locations or methods for achieving DOT's telecommunication goals. The facilities to be used to support the Intelligent Transportation System (such as cameras) and the Statewide Wireless Network, by necessity, belong in close proximity to the highway corridor.

Intergovernmental participation in project development and opportunity to be heard.

The City was notified in May, 2000 and June 2000 of the plans for the towers and invited to participate in their development, but chose not to do so. The City's Mayor, in fact, advised DOT in June, 2000 that he only considered the City an "interested" agency. This assessment effectively conceded that the City lacked authority over the proposed actions.[5]

Likewise, following notification that DOT had issued negative declarations for the towers, the City took no steps to challenge those determinations. Even in this proceeding,

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[5] See 6 NYCRR section 617.2 (s) - (u). An "involved agency" is one with jurisdiction by law to fund, approve or directly undertake an action. The lead agency is an involved agency. An "interested agency", by contrast, is one that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about a proposed action. An interested agency has the same ability to participate in the review process as a member of the public.

the City has failed to counterclaim to annul the SEQRA determinations. To the extent, therefore, the City now raises SEQRA objections in these proceedings, such objections are not properly before the Court.

Conclusion

Although no one factor is dispositive (County of Monroe, supra at 343), the Court finds that, on balance, the interests of the State outweigh the interests of the City. The cell towers that are the subject of these proceedings, therefore, are exempt from local zoning regulation.

The City is enjoined from regulating the construction and operation of the towers. The revocation of the March 23, 2001 Sidewalk Permit with respect to the replacement facility at Wilmot Road and the Notice of Violation and Stop Work Order issued May 18, 2001 with respect to the facility in the DOT Maintenance Yard were in violation of law as these actions were erroneously predicated on the applicability of local regulation.

Petitioner's request for attorney's fees is denied. Petitioner has failed to demonstrate any authority for such an award.

The foregoing constitutes, the Decision, Order & Judgment of the Court.

Dated: White Plains, New York
November 9, 2001

s/ Nicholas Colabella
Supreme Court Justice

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

CROWN COMMUNICATION NEW YORK, INC.

AFFIRMATION

Petitioner/Plaintiff,

-against- Index #7863/01

CITY OF NEW ROCHELLE, JAMES M. MAXWELL, AS INTERIM/ACTING COMMISSIONER OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF NEW ROCHELLE, and DEPARTMENT OF TRANSPORTATION OF THE STATE OF NEW YORK,

Respondents/Defendants,

Assigned Judge
-and- Hon. Nicholas Colabella

JAMES CAVANAUGH, AS TOWN SUPERVISOR OF THE TOWN OF EASTCHESTER AND JAMES CAVANAUGH, INDIVIDUALLY,

Intervenors/Respondents-Defendants,

CROWN COMMUNICATION NEW YORK, INC.
Petitioner/Plaintiff,

-against- Index #9166/2001

CITY OF NEW ROCHELLE, THE COMMISSIONER AND/OR DEPUTY COMMISSIONER OF THE DEPARTMENT OF DEVELOPMENT OF THE CITY OF NEW ROCHELLE, and THE DEPARTMENT OF TRANSPORTATION OF STATE OF NEW YORK,

Respondents-Defendants.

DAVID S. STEINMETZ, an attorney admitted to practice law in the State of New York, affirms the following under the penalties of perjury:

1. I am a member of Zarin & Steinmetz, Special Counsel for Defendants the City of New Rochelle and the Commissioner and/or Deputy Commissioner of the Department of Development of the City of New Rochelle (the "City" or "New Rochelle") in the above-captioned matter.

2. I have chosen to submit this Affirmation because I believe the Court needs to be apprised of a recent telecommunications case involving the City of New Rochelle and Nextel of New York, Inc.

3. The reason that case, and the decision of Southern District Court, are significant here, quite simply, is because New Rochelle exposed the fact that wireless telecommunications providers will make representations about public safety and the abundant need to fill gaps in service coverage when it is simply not true at all.

4. Congress recognized the role of municipalities in testing the veracity of telecommunications providers' claims of need when it amended Section 332(c)(7) of the TCA in 1999. See S. Res. 1538, 106th Cong. S10391 - *S10458-10459 (August 5, 1999) (available at 1999 WL 593813). Congress' express purpose for such amendments was, among other things, "[t]o permit State and local governments. . . to hold applicants for permits for the placement, construction, or modification of such telecommunications facilities, and provider of services using such towers and facilities, accountable for the truthfulness and accuracy of representations and statements placed in the record of hearings for such permits, licenses or approvals." Id. at S10460.

5. In the fast-paced, rapidly growing industry of wireless communications, it would be easy for a modest

municipality to give in to major private telecommunications companies "banging the table" insisting upon the issuance of a permit.

6. As our firm and the City of New Rochelle learned in the Nextel case, Congress was wise to preserve local zoning authority in situs, construction and modification determinations. The lessons learned in that case are indeed instructive in this one.

7. Our firm represented the City of New Rochelle in a recent case before the Chief Judge of the Southern District of New York, Nextel of New York, Inc. v. The City of New Rochelle, et al.. ("Nextel"), J. Mukasey, Case No. 01-CIV-10049 (S.D.N.Y. December 3, 2001).

8. The Honorable Michael B. Mukasey in that case upheld New Rochelle's enactment of a limited moratorium prohibiting approval of wireless telecommunications facilities for 90 days because he recognized the City's important interest in having an updated local ordinance designed to adequately review issues such as a provider's alleged need to close gaps in service, or to consider less intrusive or alternative locations and/or designs, and to take into account recent advances in technology including stealth technology and wireless PCS. A copy of the Transcript of the Decision is annexed hereto as Exhibit "A."

9. Judge Mukasey rejected Nextel's attempt to extricate itself from the subject moratorium by arguing that it had to relieve a serious "gap in coverage" and was thus entitled to override the City's zoning authority. In its decision, the District Court found - despite
Nextel's bald, conclusory allegations to the contrary - there was no such gap in service. In so doing, Justice Mukasey was persuaded by the sworn testimony elicited on cross-examination at the evidentiary hearing of Nextel's own expert Robert Bertona, and by the City's expert, Richard Comi.

10. Mr. Bertona, a radio frequency engineer

employed by Nextel, admitted on cross-examination "that he is unaware of any complaints Nextel has received from police, fire or school officials in New Rochelle. . . nor is he aware of any particular complaints from customers" pertaining to coverage gaps. (Decision at 9.) Additionally, the Court was further persuaded by Mr. Comi's testimony that "he conducted a drive test, using a Nextel telephone, and was able to complete and maintain telephone calls throughout the area of the alleged gap. He testified that his Nextel telephone registered at all times signal strength of five bars, the strongest available signal." (Id.)

11. When questioned by Judge Mukasey as to why Nextel would want to go to the expense of installing an antenna that is not "necessary," Mr. Comi testified "that the real issue for Nextel is the capacity of one of its existing antennas, which is overloaded - a condition that could be mitigated by putting an antenna on top of 75 White Oak Street (the location in question in that case), but could be remedied as well by making adjustments to the existing overloaded antenna." (Id.) Mr. Comi's testimony was significant because a local municipality cannot prohibit a telecommunications provider from remedying a real "gap" in service or coverage. But no such prohibition exists in, nor does any protection emanate from, the TCA in connection with a carrier's attempt to increase its capacity in a particular cell area.

12. If the private providers are permitted to bootstrap onto the State's immunity here, New Rochelle, and by implication all municipalities, lose the opportunity to make the critical determination as to whether the individual private providers seeking to locate antennas within its borders are doing so because of a real gap in coverage or merely because of a commercial desire to increase capacity. Absent this opportunity, the local land use authority specifically preserved by the TCA's savings clause becomes meaningless, and Congress' intent in enacting that provision would be

frustrated.

13. Sovereign immunity is not supposed to provide a basis for some private carriers to obtain a competitive advantage over others.

14. In exercising its authority under the TCA by seeking to ensure that the individual providers comply with New Rochelle's Telecommunications Law, Respondent is not trying to preclude wireless communications in the City of New Rochelle. (See Affirmation of Bernis Nelson dated November 15, 2001, submitted in connection with the Nextel litigation and attached hereto as Exhibit "B".

15. Rather, the City is merely seeking to make certain that any such facilities are located, designed and constructed appropriately. There have been significant advances in telecommunications technology, including collocation, stealth technology, and towerless PCS-over-cable or PCS-over-fiber phone service, which are designed to minimize the proliferation of cellular towers and antennas and reduce their aesthetic impacts. The requirement in local codes that providers at least consider, if not implement, these technologies is recognized by Congress and the courts interpreting the TCA as a legitimate exercise of local authority.

16. Thus, there is no reason why local zoning should not apply here given the explicit language of Crown's written agreement and the TCA's explicit delegation to localities of the right to regulate the placement, construction and modification of personal wireless service facilities.

Dated: April 12, 2001

s/ DAVID S. STEINMETZ

Excerpts from the Appellate brief in the Appellate Division, Second Department of the,

CITY OF NEW ROCHELLE, JAMES M. MAXWELL, AS INTERIM/ACTING COMMISSIONER OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF NEW ROCHELLE,

Respondents-Defendants-Respondents,

Appellate Division Docket No. 2002-6435,
Westchester County Clerk's Index No. 7863/01

B. Compliance with Local Regulations is Required by Federal Law.

The Telecommunications Act expressly preserves local jurisdiction with respect to telecommunications facilities including the regulation of "the placement, construction and modification of personal, wireless service facilities". 47 USC Section 332(c)(7). Courts have recognized that the Telecommunications Act specifically preserves the autonomy of local municipalities. Sprint Spectrum L.P. v. Willoth, 176 F.3d 630,639, (2nd Cir. 1999); see also New York SMSA Limited Partnership v. The Town of Clarkstown, 99 F.Supp. 2d 381 (S.D.N.Y. 2000) (finding that the Town could properly choose between competing proposals to build towers and base its choice upon a desire to minimize the level of radio frequency that would reach the surrounding area); Omnipoint Commun. v. Newtown Township, 219 F.3d 240 (3d Cir. 2000); cert den'd 531 U.S. 985 (2000) (upholding Town Board's denial of building permit because the gap in providers coverage of wireless services was insufficient alone to establish a "significant" gap in wireless services); AT&T Wireless, PCS, Inc. v. City Council of the City of Virginia Beach, 155, F.3d 423 (4th Cir. 1998).

Moreover, the Telecommunications Act prohibits unreasonable discrimination against providers of functionally equivalent services. 47 U.S.C. §332(c) (7)(B)(i) (I); See Willoth, 176 F .3d 630 (2d Cir. 1999).

Courts have specifically held that the location of personal wireless service facilities on municipal buildings is subject to local zoning regulations. Omnipoint Communications, Inc. v. Common Council of the City of Peekskill, 202 F.Supp. 2d 210 (S.D.N.Y. 2002). In Omnipoint v. City of Peekskill, the City allowed several wireless service carriers to place antenna on municipal property without obtaining a building permit as is required for such facilities pursuant to the Peekskill Zoning Code. Id. The Court held that wireless service facilities located on municipally-owned buildings were subject to local regulations. Id. (citing Foster v. Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dept., 1981) (lease by a school district to a private manufacturing company was subject to local regulations). Moreover, the Court held that the City of Peekskill unlawfully discriminated against other carriers by attempting to extend its own immunity to private telecommunications carriers. Id; see also Little Joseph Realty. Inc. v. Town of Babylon, 51 A.D.2d 158,379 N.Y.S.2d 436 (2d Dept., 1976) aff'd 41 N.Y.2d 738, 395 N.Y.S.2d 428 (1977).

In Little Joseph Realty, this Court held that "a municipality may not engage in the business of selling its zoning exemptions to the highest bidder [and]... it cannot immunize [such] activity from zoning law restrictions by transfer to a private business entity". Little Joseph Realty Inc. v. Town of Babylon, 51 A.D.2d 158, 164, 379 N.Y.S.2d 436,440 (2d Dept., 1976) app. dism'd 39 N. Y.2d 827, 385 N.Y.S.2d 768 (1976) aff'd 41 N.Y.2d 738, 395 N.Y.S.2d 428 (1977).

Thus, where a government enters into a lease with a privately-operated commercial venture in exchange for

licensing fees, such lease does not confer any special benefit upon the licensee that it would not otherwise have if it were on private property. Gannett Sattelite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984) (MTA's management of train station facilities and its lease to Gannett for newsracks is proprietary and not governmental); Queens County Business Alliance, Inc. v. New York State Racing Association, 89 A.D.2d 46, 454 N.Y.S.2d 544 (2d Dept., 1982).

In Queens County Business Alliance, this Court held that the operation of flea markets on racetrack parking lots was subject to local zoning regulations even though the operation of the racetracks was a governmental function. Id; see e.g., Foster v. Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dept., 1981) (holding that use of unused school facility to private corporation for limited industrial use was subject to local zoning); People of the State of New York v. New York Racing Association, 457 N.Y.S.2d 668 (App. Term 2nd and 11th District 1982) (finding that leasing of a race track parking field for use as a flea market was not immune from local regulations); People v. Witherspoon, 52 Misc. 2d 320, 275 N.Y.S.2d 592 (Dist. Ct., Suffolk Co. 1966) aff'd 60 N.Y.2d 70, 468 N.Y.S.2d 450 (the erection of commercial billboards on property owned by the Metropolitan Transportation Authority (MTA) had no direct bearing on the MTA's governmental function of providing rail transportation services and as such was subject to local regulations); County of Westchester v. Village of Mamaroneck, 22 A.D.2d 143, 255 N.Y.S.2d 290 (2d Dept. 1964) aff'd 16 N.Y.2d 940, 264 N.Y.S.2d 925 (1965); Nehrbas v. Incorporated Village of Lloyd Harbor, 2 N.Y.2d 190, 159 N.Y.S.2d 145 (1957); People of the State of New York v. Witherspoon, 52 Misc.2d 320, 275 N.Y.S.2d 592 (Dist. Ct., Suffolk Co. 1966) (use of MTA property for erection of commercial advertising signs was merely incidental to the governmental function and required use

compliance with local zoning ordinance).

Therefore, the Telecommunications Act exclusively reserves the right of local municipalities to regulate the placement and siting of telecommunications uses and Courts have held that such authority specifically includes facilities located on government property. It is important to note that the Telecommunications Act, while expressly preserving local jurisdiction, specifically gives state and local governments the right to allow private telecommunications carriers to locate on government property "on a competitively neutral and non-discriminatory basis..." 47 U.S.C. Section 253 (c). Thus, in contemplating the location of telecommunications facilities on government property, Congress never indicated that such facilities would be exempt from local regulations. In fact, as previously stated, the Telecommunications Act specifically preserves local authority.

In light of the clear legislative intent of the Telecommunications Act as well as the above-cited legal precedent, it is respectfully submitted that Judge Colabella properly held that the private telecommunications carriers located on the two towers constructed by Crown are subject to local regulations.

Excerpts from the Motion for Leave to Appeal to the Court of Appeals of the,

CITY OF NEW ROCHELLE, JAMES M. MAXWELL, AS INTERIM/ACTING COMMISSIONER OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF NEW ROCHELLE,

Appellants,

POINT I

THE INDIVIDUAL TELECOMMUNICATIONS CARRIERS ARE SUBJECT TO LOCAL REGULATIONS.

A. Compliance with Local Regulations is Required by Federal Law.

The Telecommunications Act expressly preserves local jurisdiction with respect to telecommunications facilities, including the regulation of "the placement, construction and modification of personal, wireless service facilities". 47 USC Section 332(c)(7). Courts have recognized that the Telecommunications Act specifically preserves the autonomy of local municipalities. Sprint Spectrum L.P. v. Willoth, 176 F.3d 630,639, (2nd Cir. 1999); see also New York SMSA Limited Partnership v. The Town of Clarkstown, 99 F.Supp. 2d 381 (S.D.N.Y. 2000); Omnipoint Commun. v. Newtown Township, 219 F.3d 240 (3d Cir. 2000); cert den'd 531 U.S. 985 (2000); AT&T Wireless, PCS, Inc. v. City Council of the City of Virginia Beach, 155, F.3d 423 (4th Cir. 1998). Moreover, the Telecommunications Act prohibits unreasonable discrimination against providers of functionally equivalent services. 47 U.S.C. §332(c) (7)(B)(i) (I); See Willoth, 176

F.3d 630 (2d Cir. 1999).

Courts have specifically held that the location of personal wireless service facilities on public property is subject to local zoning regulations. Omnipoint Communications. Inc. v. Common Council of the City of Peekskill, 202 F. Supp. 2d 210 (S.D.N.Y. 2002). In Omnipoint v. City of Peekskill, the City allowed several wireless service carriers to place antenna on municipal property without obtaining a building permit as is required for such facilities pursuant to the Peekskill Zoning Code. Id. The Court held that wireless service facilities located on governmental property were subject to local regulations. Id. (citing Foster v. Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dept., 1981) (lease by a school district to a private manufacturing company was subject to local regulations). Moreover, the Court held that the City of Peekskill unlawfully discriminated against other carriers by attempting to extend its own immunity to certain private telecommunications carriers located on City property. Id; see also Little Joseph Realty. Inc. v. Town of Babylon, 51 A.D.2d 158, 379 N.Y.S.2d 436 (2d Dept., 1976) aff'd 41 N.Y.2d 738, 395 N.Y.S.2d 428 (1977).

Similarly, other jurisdictions have held that telecommunications facilities constructed on state-owned property are subject to the zoning regulations of the local government. Board of Supervisors of Fairfax County v. Washington. D.C. SMSA L.P., 258 Va. 558, 522 S.E.2d 876 (S.C. Va. 1999). In Fairfax County, the Supreme Court of Virginia held that where individual telecommunications carriers share use of a telecommunications tower on state-owned land with the Department of Transportation, such carriers are not immune from local regulations. Id. The Court held that the "mere fact that the towers are conveniently, or even necessarily, located on state-owned rights-of-way is irrelevant to the question whether they fall within the regulatory authority of the planning

commission..." Id. at 881. The court specifically held then that, although the Department of Transportation itself was immune from local regulations, such immunity did not extend to the individual telecommunications carriers. Id.

Moreover, in Little Joseph Realty, the Second Department held that "a municipality may not engage in the business of selling its zoning exemptions to the highest bidder [and]...it cannot immunize [such] activity from zoning law restrictions by transfer to a private business entity". Joseph Realty Inc. v. Town of Babylon, 51 A.D.2d 158, 164, 379 N.Y.S.2d 436, 440 (2d Dept., 1976) app. dism'd 39 N.Y.2d 827, 385 N.Y.S.2d 768 (1976) aff'd 41 N.Y.2d 738, 395 N.Y.S.2d 428 (1977). Thus, where a government enters into a lease with a privately-operated commercial venture in exchange for licensing fees, such lease does not confer any special benefit upon the licensee that it would not otherwise have if it were on private property. Gannett Sattelite Information Network. Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984) (MTA's management of train station facilities and its lease to Gannett for newsracks is proprietary and not governmental); Queens County Business Alliance, Inc. v. New York State Racing Association, 89 A.D.2d 46, 454 N.Y.S.2d 544 (2d Dept., 1982).

In Queens County Business Alliance, the Second Department held that the operation of flea markets on racetrack parking lots was subject to local zoning regulations even though the operation of the racetracks was a governmental function. Id; see e.g., Foster v. Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dept., 1981) (holding that use of an unused school facility to private corporation for limited industrial use was subject to local zoning); People of the State of New York v. New York Racing Association, 457 N. Y.S.2d 668 (App. Term 2nd and 11th District 1982) (finding that leasing of a race track parking field for use as a flea market was not immune from local regulations);

People v. Witherspoon, 52 Misc. 2d 320, 275 N.Y.S.2d 592 (Dist. Ct., Suffolk Co. 1966) aff'd 60 N.Y.2d 70, 468 N.Y.S.2d 450 (the erection of commercial billboards on property owned by the Metropolitan Transportation Authority (MTA) had no direct bearing on the MTA's governmental function of providing rail transportation services and as such was subject to local regulations); County of Westchester v. Village of Mamaroneck, 22 A.D.2d 143, 255 N.Y.S.2d 290 (2d Dept. 1964) aff'd 16 N.Y.2d 940, 264 N.Y.S.2d 925 (1965); Nehrbas v. Incorporated Village of Lloyd Harbor, 2 N.Y.2d 190, 159 N.Y.S.2d 145 (1957).

Therefore, the Telecommunications Act exclusively reserves the right of local municipalities to regulate the placement and siting of telecommunications uses and courts have held that such authority specifically includes facilities located on government property. It is important to note that the Telecommunications Act, while expressly preserving local jurisdiction, specifically gives state and local governments the right to allow private telecommunications carriers to locate on government property and to require the payment of fair and reasonable compensation "on a competitively neutral and non-discriminatory basis..." 47 U.S.C. Section 253(c). Thus, in contemplating the location of telecommunications facilities on government property, Congress never indicated that such facilities would be exempt from local regulations. In fact, as previously stated, the Telecommunications Act specifically preserves local authority.

In its decision, the Appellate Division held that the activities of the private telecommunications carriers were immune from local regulations based upon the "public nature" of the services they provide and that the revenue from such services may provide financing for a potential State use of the towers in the future. (Appellate Division Order, page 3, annexed heretc). In light of the clear legislative intent of the Telecommunications Act as well as

the above-cited legal precedent, it is respectfully submitted that such finding is in violation of federal law which expressly reserves the right of local governments to regulate such activities while recognizing that such activities may be located on government land for a reasonable fee. Thus, Congress recognized that the location of private telecommunications facilities on government property would provide a source of revenue for the government, yet never indicated that such arrangement would immunize the private carriers from local regulations. In fact, Congress specifically and expressly preserved local authority to regulate such carriers.

Moreover, the State has violated the Telecommunications Act by extending its immunity to the particular carriers located on state property to the clear disadvantage of other telecommunications carriers who are required to comply with local regulations in order to operate in New Rochelle. Based upon the foregoing, it is respectfully submitted that this Court grant the City leave to appeal.

B. Compliance with Local Regulations is Required Under the Clear Language of the State's Own Agreements.

The individual telecommunications carriers are subject to local regulations as required by the language of the State's own agreements. Paragraph 10 of the Agreement between the State and Crown, specifically provides that Crown shall comply with all applicable local, state, and federal laws. (R. 325, omitted and filed separately). Annexed to the Agreement is a Form User License to be executed by Crown when granting a user license to a private telecommunications carrier for use of any of the proposed towers. (R. 327).

Paragraph 7 of the Form User License provides:

the installation, maintenance, and operation of

> Licensee's Site Equipment must at all times be in strict compliance with the Technical Standards, all applicable federal, state, and local laws, ordinances, and regulations (including, without limitation, the FCC, Federal Aviation Administration, city zoning, building, and fire codes...)

(R. 330). (emphasis added). This Form User License with the provision requiring compliance with local regulations was executed by Crown when it granted user licenses to AT&T, Voicestream and Nextel. (R. 341, 356 and 373).

Thus, pursuant to the provisions of its own agreements, the State required compliance with local regulations and AT&T, Voicestream and Nextel have expressly agreed to said requirement. Judge Colabella then simply enforced the plain language of the State's agreements rejecting the State's position that the provisions of its own agreements should not be given full force and effect. Since Crown, the State, AT&T, Voicestream and Nextel have previously agreed that the individual telecommunications carriers shall comply with local regulations, the decision of Judge Colabella should have been affirmed. The Appellate Division has held that the State's agreements do not require compliance with local regulations. (Appellate Division Order, page 4, annexed hereto) However, as provided herein, the plain language of the State's agreements executed in connection with the subject matter requires strict compliance with local regulations. Based upon the foregoing, Judge Colabella properly held that although the State's use of the proposed towers was immune from local regulations, any use of the towers by individual telecommunications carriers was in fact subject to local regulations.

Excerpts from the Appeal brief in the Court of Appeals of the,

CITY OF NEW ROCHELLE, JAMES M. MAXWELL, AS INTERIM/ACTING COMMISSIONER OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF NEW ROCHELLE,

Appellants,

STATEMENT OF FACTS

This matter involves two telecommunications towers constructed on state-owned property located entirely within the City of New Rochelle. The first site is located at Exit 15 of the Hutchinson River Parkway (the "Maintenance Yard Site"). The second site is located at the intersection of the Hutchinson River Parkway and Wilmot Road (the "Wilmot Road Site").

On August 25, 1997, Castle Tower Holding Corporation and the State of New York under the jurisdiction of the Department of Police (collectively, the "State") entered into a Telecommunications Site Manager Agreement (the "Agreement"), which was subsequently assigned to Crown Communication of New York Inc. ("Crown"). (R. 24, 632).[1]

Pursuant to paragraph 2 of the Agreement, Crown enjoys, "*an exclusive license to use all rights of the State* in and to the Sites which are necessary for CTHC's [Crown's] *full use and exploitation* of the Sites for the purposes set forth in this Agreement...". (R. 637) (emphasis added). In

[1] All references to the record below will be referred to as "(R._) The additional papers filed in this Court that are submitted as part of the record herein will be referred to as "(CA _)".

compensation for exclusive rights, paragraph 3 requires Crown to pay the State 30% to 50% of the gross revenue generated from user licenses granted by Crown to private telecommunications providers for use of the towers. (R.639-640).

The interest granted to Crown in the Agreement is exclusive even in relation to the State's interest. Significantly, paragraph 13 of the Agreement provides that the State must submit a formal request for use of any proposed tower. (R. 645). Such request may be denied by Crown based upon "space availability, capacity and the rights of any then existing users." (R. 645).

Additionally, the Agreement requires strict compliance with local regulations with respect to all user licenses granted by Crown. (R. 642, 671). Specifically, the State annexed to the Agreement a Form User License to be used by Crown when entering into user licenses with private telecommunications carriers. (R. 668). The State's Form User License provides as follows:

> Licensee's site equipment must at all times be in *strict compliance* with the Technical Standards, all applicable federal, state and local laws, ordinances, and regulations (*including, without limitation, the FCC, Federal Aviation Administration, city zoning, building and fire codes*).

(R. 671) (emphasis added).

Thus, when the Agreement was executed, the State and Crown clearly intended that any use of the proposed towers by private telecommunications carriers would be subject to local regulations. Thereafter, AT&T, Voicestream and Nextel executed user licenses expressly agreeing to comply with local regulations. (R. 341,356 and 373).

On June 13, 2000, representatives of Crown and the State met with the New Rochelle City Council. (R.386). At that meeting, Charles L. White, a state official, presented a conceptual plan to construct telecommunications towers on state-owned property throughout the State of New York. (R.386). The State then sent the City a four-page Negative Declaration of Environmental Significance indicating that the environmental review was complete, one month after having this first and only informational meeting with City Council. (R. 272).

However, the documents reviewed by the State in its environmental review, including without limitation, the construction drawings, visual analysis and full environmental assessment form, were not submitted to the City until twenty (20) days after the completion of construction with respect to the Maintenance Yard Site and after the State authorized the commencement of construction with respect to the Wilmot Road Site. (R.388). Thus, the State and Crown proceeded to construct the towers without affording the City a meaningful opportunity to participate in its environmental review.

The State and Crown argued before the Court below that pursuant to Matter of the County of Monroe, the City was preempted from regulating the construction and operation of the towers. The City argued that Matter of County of Monroe does not apply to this matter since the use of the towers by the private telecommunications providers is neither governmental nor accessory to a governmental use. (R. 402, 404). The City also argued that compliance with local regulations was required by federal law as well as the agreements executed by the State, Crown and the private telecommunications providers associated with this matter.

The City respectfully submits that the, holding in Matter of County of Monroe, does not apply because this matter does not involve a governmental use that is the primary use of the property. Moreover, the order of the Appellate Division is contrary to the Telecommunications Act

as well as the clear language and intent of the State's own Agreement.

POINT II

EVEN IF APPLICABLE, MATTER OF COUNTY OF MONROE REQUIRES COMPLIANCE WITH LOCAL REGULATIONS.

Even under the standards set forth in Matter of County of Monroe, compliance with local regulations is required.

A. Authorizing Statute: Legislative Intent.

Here, unlike Matter of County of Monroe, there is no evidence of legislative intent to exempt the private telecommunications carriers from local regulation. 72 N.Y.2d 338. To the contrary, the Telecommunications Act expressly preserves local jurisdiction with respect to telecommunications facilities, including the regulation of "the placement, construction and modification of personal, wireless service facilities" while recognizing that such facilities may be located on government land for a fee. 47 U.S.C. § 332(c) (7) & 47 U.S.C. § 253(c).[4]

Additionally, the Telecommunications Act prohibits unreasonable discrimination by government entities against providers of functionally equivalent services. 47 U.S.C. §332(c) (7)(B)(i)(I). Thus, granting governmental immunity

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[4] See Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (200 Cif. 1999); Omnipoint Commun. v. Newtown Township, 219 F.3d 240 (3d Cir. 2000); cert den'd 531 U.S. 985 (2000); AT&T Wireless, PCS, Inc. v. City Council of the City of Virginia Beach, 155 F.3d 423 (4th Cir. 1998).

to some private telecommunications carriers but not others, based only upon whether they pay a fee to the State, clearly violates this prohibition.

Moreover, courts have specifically held that the location of personal wireless service facilities on public property is subject to local zoning regulations. Omnipoint Communications, Inc. v. Common Council of the City of Peekskill, 202 F. Supp. 2d 210 (S.D.N.Y. 2002). In Omnipoint v. City of Peekskill, the City of Peekskill allowed several wireless service carriers to place antennae on municipal property without obtaining a building permit as is required for such facilities pursuant to the Peekskill Zoning Code. Id. The Court held that wireless service facilities located on government property were subject to local regulations. Id. (citing Foster v. Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dept., 1981).[5] Moreover, the Court held that the City of Peekskill unlawfully discriminated against other carriers by attempting to extend its own immunity to certain private telecommunications carriers located on City property. Id. at 226.

Therefore, the Telecommunications Act, while expressly preserving local jurisdiction, specifically gives state and local governments the right to allow private telecommunications carriers to locate on government property and to require the payment of fair and reasonable compensation "on a competitively neutral and

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[5] Other jurisdictions have similarly held that telecommunications facilities constructed on state-owned property are subject to the zoning regulations of the local government Board of Supervisors of Fairfax County v. Washington. D.C. SMSA L.P., 258 Va. 558, 522 S.E.2d 876 (S.C. Va. 1999) ("The mere fact that the towers are conveniently, or even necessarily, located on state-owned rights-of-way is irrelevant to the question whether they fall within the regulatory authority of the planning commission..." Id. at 566).

non-discriminatory basis". 47 U.S.C. Section 253(c). In contemplating the location of : telecommunications facilities on government property then, Congress never intended that such facilities would be exempt from local regulations. Rather, the Telecommunications Act expressly preserves local authority. Therefore, unlike the statute governing municipal airports at issue in the Matter of County of Monroe, the Legislature clearly intended that telecommunications facilities located on government land would be subject to local regulations.

In any event, under the balancing approach, the scales tip in favor of compliance with local regulations.

B. Nature and Scope of the Instrumentality Seeking Immunity.

The instrumentality seeking immunity here is clearly private. Although the individual telecommunications carriers provide a service to the public, they are not governmental entities performing a governmental function.

The Agreement between the State and Crown demonstrates that the State itself deemed the use of the towers by the individual telecommunications carriers to be private when it required such carriers to comply with local regulations. (R. 642, 671). Indeed, this accords with the intent of the Telecommunications Act to subject private carriers located on government land to local regulations.

Specifically, the State annexed to its Agreement a Form User License to be executed by Crown when granting user licenses to private telecommunications.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

CROWN COMMUNICATION NEW YORK, INC.

Index #7863/01

Petitioner/Plaintiff,

Decision & Order

-against-

Motion Date
4/12/02

CITY OF NEW ROCHELLE, JAMES M. MAXWELL, AS INTERIM/ACTING COMMISSIONER OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF NEW ROCHELLE, and DEPARTMENT OF TRANSPORTATION OF THE STATE OF NEW YORK,

D

Respondents/Defendants,

-and-

JAMES CAVANAUGH, AS TOWN SUPERVISOR OF THE TOWN OF EASTCHESTER AND JAMES CAVANAUGH, INDIVIDUALLY,

Intervenors/Respondents/Defendants,

CROWN COMMUNICATION NEW YORK, INC.

Petitioner-Plaintiff,

Index #9166/02

Decision & Order

- against -

Motion Date
4/12/02

CITY OF NEW ROCHELLE, THE COMMISSIONER AND/OR DEPUTY COMMISSIONER OF THE DEPARTMENT OF DEVELOPMENT OF THE CITY OF NEW ROCHELLE, and THE DEPARTMENT OF TRANSPORTATION OF STATE OF NEW YORK,

D

Respondents-Defendants.

The following papers numbered 1-33 were read on motion to reargue the Order and Judgment of the Court dated November 13, 2002:

Notice of motion, affidavit, exhibits, memorandum - 1-7
Affirmations in opposition, exhibits, memorandum -8-11,12
Affirmations in support, exhibit, memorandum - 13-14
Reply memorandum - 15
Supplemental affirmations/affidavits in opposition, exhibits, memoranda - 16-26, 27-28
Supplemental affirmations in support, exhibits, memorandum - 29, 30-33

Leave to reargue is granted and, upon reargument, the Court modifies the Order and Judgment dated November 13, 2002 to the extent that the Court finds that the individual telecommunication providers are subject to local regulations including, but not limited to, the act known as the "Regulation of Telecommunication Facilities for Personal Wireless Services and Other Communications Services in the City of New Rochelle."[1] The Court otherwise adheres to it's original decision.

The Telecommunications Site Manager Agreement as well as the Form User License require compliance with all applicable local, state and federal laws. The wireless service providers have also agreed in the license agreements to compliance. There is no basis to exempt individual wireless service providers from such requirements.

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[1] New Rochelle Code, Telecommunications Facilities sections 331-64.1 et seq. At issue are the attachment of ancillary commercial antennas to the State towers.

Dated: White Plains, New York, 6/28/02

Nicholas Colabella
Supreme Court Justice

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